

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Reina V. Carillos,	.	Docket #11-CV-5775 (JFB)
	.	
Plaintiff,	.	
	.	United States Courthouse
vs.	.	Central Islip, New York
	.	October 22, 2012
The Incorporated Village of	.	5:26 p.m.
Hempstead, et al.,	.	
	.	
Defendants.	.	

.....

TRANSCRIPT OF THE COURT'S RULING
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For The Plaintiff:	Thomas F. Liotti, Esq. Law Offices of Thomas F. Liotti 600 Old Country Rd.-Ste. 530 Garden City, NY 11530
For Defendants The: Incorporated Village of Hempstead and Police Officer Americo Masi	William J. Garry, Esq. Harris Beach, PLLC 333 Earle Ovington Blvd. Suite 901 Uniondale, NY 11553
For Defendants Suyapa Gomez, : Arlington Bodden, Majorie Bodden, Carlos Flores and Wendy Almendarez	Kenneth E. Aneser, Esq. Rosenberg Calica & Birney, LLP 100 Garden City Plaza Suite 408 Garden City, NY 11530

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1 THE CLERK: Calling case 11-CV-5775, Carrillos v.
2 The Incorporated Village of Hempstead. Counsel, please state
3 your appearance for the record.

4 MR. LIOTTI: For the Plaintiff, Thomas F. Liotti,
5 Suite 530, 600 Old Country Road, Garden City, New York.

6 MR. ANESER: Kenneth Aneser, Rosenberg, Calica and
7 Birney, for the individual Defendants, Suyapa Gomez, Arlington
8 Bodden, Marjorie Bodden, Carlos Flores, and Wendy Almendarez.

9 MR. GARRY: William Garry of the firm Harris Beach,
10 333 Earle Ovington Boulevard, Uniondale, New York, 11553 for
11 the Defendant, The Incorporated Village of Hempstead and
12 Police Officer Americo Masi.

13 THE COURT: Okay, good afternoon, this is Judge
14 Bianco. First of all, I want to apologize for the delay. We
15 had a little bit of a crazy day. We had one jury deliberating
16 today, another trial starting, so we got a little behind
17 schedule. But the purpose of this, as you know, is to place
18 the Court's ruling on the record with respect to the
19 Defendant's motion. And so then I will do that now, and then
20 we can discuss next steps. Okay, just give me one second.
21 Hold on one second.

22 (Pause in proceedings)

23 THE COURT: Okay. The Motion to Dismiss --
24 obviously if you want a transcript of this, this is being
25 recorded on the Court taping system here, so if you want a

1 transcript of the Court's ruling you can contact my Deputy and
2 she'll explain to you how to order the transcript. The motion
3 of the individual Defendants to dismiss under 12(b)(6) is
4 denied, with the exception of Carlos Flores and Wendy
5 Almendarez is granted with respect to them, and I'm going to
6 explain the Court's reasons briefly.

7 First, in connection with the standard for a Motion to
8 Dismiss, I'm not going to belabor the record by repeating it
9 in any great detail. I adopt the standard I set forth in
10 Young vs. Suffolk County, 705 F.Supp.2d 183, an Eastern
11 District of New York case, April 9th of 2010. The standard,
12 as both sides know, is the Plaintiff's allegations are
13 accepted as true or reasonable inferences are drawn in
14 Plaintiff's favor, and then the Court must determine under
15 Iqbal and Twombly whether or not a plausible claim has been
16 stated in this case under Section -- under federal law,
17 including Section 1983, and that's the standard that the Court
18 is operating under. Similarly, as it relates to the grounds
19 being raised here with respect to the motion, which is a lack
20 of state action, as both sides know, and we discussed it
21 during the oral argument, the law is well settled in this
22 area. And again, it's laid out in the Young case in detail,
23 and in another case that I decided called Anilao v. Spota, A-
24 N-I-L-A-O, v. Spota, 774 F.Supp.2d 457 (EDNY, 2010). And
25 again, I adopt the standards set forth in those cases on the

1 issue of whether or not a private actor -- whether or not a
2 plausible claim against a private actor has been stated under
3 Section 1983.

4 But in summary, the question is whether or not the
5 private actor was a willful participant in the joint activity
6 with respect to the state or its agents. And as discussed in
7 those opinions, it's clear that simply providing information
8 to police officers or contacting the police, even if the
9 information is false or results in an arrest, is not in itself
10 sufficient to constitute joint action with state actors for
11 purposes of Section 1983. The Plaintiff, either to allege
12 joint action or a conspiracy, must establish something more,
13 such as concerted acts together between the private party and
14 the state actor or an understanding was reached in some manner
15 between the state actor and the private actor. And the Court
16 obviously is aware of those cases. In fact, I've dismissed
17 numerous cases on precisely that ground.

18 Applying that standard to this case, I conclude, other
19 than -- I'll come back to Mr. Flores and Ms. Almendarez in a
20 moment because I think the issue is different with respect to
21 them. But accepting all the allegations in the complaint
22 against the other Defendants, the individual Defendants,
23 drawing all reasonable inferences in the Plaintiff's favor, I
24 find that a plausible claim under Section 1983 against these
25 private actors has been alleged for the following reason. As

1 the complaint sets forth -- and again, and I'm accepting this
2 for its truth for purposes of the Motion to Dismiss. It
3 alleges that the Hempstead Police Department, including
4 Officer Masi, received, in paragraph 35 and 36, free food and
5 other favors from Ms. Gomez in connection with the restaurant
6 and the nightclub in addition to that. And this, I think,
7 makes this not a close call for purposes of the Motions to
8 Dismiss. In paragraph 37, it specifically alleges that after
9 the Plaintiff's arrest, Gomez told her employees that she
10 could have anyone she wanted arrested because she had
11 influence with the Hempstead Police Department. It alleges
12 that she indicated she had the cell phone numbers of the
13 officers who arrested Plaintiff, and it's alleged that she
14 told other employees that she would have them arrested if they
15 ever crossed her. This is precisely the type of evidence that
16 would support, if proven -- again, the question is obviously
17 whether that'll be proven or not. At this point nobody knows.
18 But as alleged, if that were proven, that would demonstrate
19 the type of joint action or influence of the police decision
20 that is clearly actionable under Section 1983 against a
21 private actor. I don't think there's any question with
22 respect to that.

23 There are a number of cases that have spoken to this;
24 one, although it's not in the Circuit, I think, again, it
25 exemplifies the point that this Court is trying to make. It's

1 consistent with my ruling in this case. This is a case called
2 Wagenmann, W-A-G-E-N-M-A-N-N, v. Adams, 829 F.2d 196 (1st
3 Circuit, 1987) and it lays out the standard. I think it was
4 under Massachusetts law, but I think it's the same for
5 purposes of this issue with New York law and the law under
6 Section 1983. And it cites the standard that the officer must
7 be so induced or instigated by the Defendant that the act of
8 the arrest is made by the officer not of his own volition but
9 to carry out the request of the Defendant. And examining
10 whether or not that was met in that particular case, it noted
11 circumstantial evidence that the private actor exerted
12 influence on the authorities with respect to the arrest in
13 that case. It noted that the fact that that particular
14 private actor had social acquaintances with I think it was the
15 Deputy Chief of the Department and that had the unpublished
16 telephone number of the Deputy Chief. And reviewing all the
17 evidence with respect to the alleged relationship or influence
18 between the private actor and the police officers involved, it
19 concluded that the state action requirement had been met with
20 respect to the private actor under Section 1980 and 1983.

21 Similarly, to the extent of the argument, I think this
22 was noted in the papers and this was really the focus of the
23 argument where Defendant's counsel said several times that
24 there's no explicit agreement, there's no allegation of an
25 explicit agreement, the law does not require an explicit

1 agreement, as the Wagenmann case noted and many other cases
2 have noted over and over again, that a meeting of the minds
3 for purposes of some types of agreement can be reached either
4 through direct evidence or circumstantial evidence, including
5 a case called D'Agostino v. New York State Liquor Authority,
6 913 F.Supp 757 (Western District of New York, 1996), where the
7 Court, although in that case ruling there was insufficient
8 evidence, set forth what I think is the applicable standard,
9 citing the Supreme Court and the 2nd Circuit to establish
10 Section 1983 liability based upon an alleged conspiracy with a
11 public official, there must be some evidence, circumstantial
12 or direct, upon which the jury could infer that the private
13 party and the state actor had a meeting of the minds enough to
14 reach an understanding that the Plaintiff should be deprived
15 of some right. So clearly circumstantial evidence is
16 sufficient. And in fact, as I noted a moment ago, if
17 credited, the statement by the Defendant in this case that she
18 could have anybody arrested who she wanted to because of her
19 relationship would certainly satisfy -- would be evidence, an
20 admission of in fact the type of relationship that would be
21 actionable under this theory of liability.

22 So for those reasons I find that as it relates to the
23 issue of private action, that Plaintiff has made a plausible
24 claim with respect to the private actor theory of the case.

25 With respect to the remaining issue, and again, I

1 discussed this at the oral argument, it was to look at each
2 individual Defendant and see whether or not there was
3 sufficient alleged personal involvement of each of those
4 Defendants to overcome the Motion to Dismiss. And again, the
5 standard for personal involvement is well settled. I adopt
6 the standard I set forth in a case earlier this year, Houston
7 v. Nassau County, 2012 Westlaw 729352 (March 7, 2012). And
8 it's clear under Section 1983 that personal involvement in the
9 alleged -- of the Defendants in the alleged constitutional
10 deprivation is a prerequisite to an award of damages under
11 Section 1983, and it can't be done in a completely conclusory
12 way that just names the Defendants in a group, but doesn't
13 describe what each of the Defendants did that would make them
14 arguably involved in the constitutional deprivation that's
15 being alleged. When I reviewed the amended complaint with
16 respect to each of the individual Defendants, obviously based
17 upon the paragraphs I already noted, there are certainly
18 personal involvement alleged throughout the complaint of
19 Suyapa Gomez. With respect to Arlington Bodden and Marjorie
20 Bodden, I have met -- I have concluded that the standard has
21 been met based upon paragraph 41, which alleges not only their
22 presence on December 3rd, but they were involved -- again,
23 this is as alleged -- in the refusal of the entry of Plaintiff
24 to the business and the calling of the police officers in
25 connection with the arrest. So I find that has been met with

1 respect to them.

2 However, with respect to Carlos Flores and Wendy
3 Almendarez, the allegations against Wendy Almendarez I think
4 are contained in paragraph 42, which says that she was
5 involved in some prior incident I think in March of 2010, but
6 obviously that's not the subject matter of this complaint,
7 other than I guess as background. But it alleges that she was
8 present on December 3rd of 2010, and I conclude that her mere
9 presence, even though obviously she has a relationship to the
10 other Defendants that is a daughter, an employee, the presence
11 of an employee or a family member in the restaurant on the
12 date in question is certainly not sufficient to state a
13 plausible claim against her. And similarly, Mr. Flores, as
14 the boyfriend, simply alleging that he's the boyfriend, he was
15 present, is also not sufficient to state a plausible claim
16 against him. So the case against those two Defendants is
17 dismissed for a lack of personal involvement in the alleged
18 unconstitutional action on that date.

19 The other motion that was made was under Rule 12(f) to
20 strike certain portions of the pleading, and the Court denies
21 that. The standard for that is in a case Sloup v. Loeffler,
22 2006 Westlaw 767869 (Eastern District of New York, March
23 2006). And I cited in that case the standard which makes
24 clear that Motions to Strike are not favored and will not be
25 granted unless it is clear that the allegations in question

1 can have no possible bearing on the subject matter of the
2 litigation. And the 2nd Circuit has stated, {quote} "The
3 Court should not tamper with the pleadings unless there is a
4 strong reason for so doing." Here, obviously these are
5 serious allegations that are being alleged against the police
6 officer and others who are alleged to have been involved in
7 the action, but that fact alone does not mean that they should
8 be stricken. They do have relevance to the claim, to the
9 extent, again, that it has to be shown that -- not just what
10 the circumstances were regarding -- with respect to the
11 alleged arrest, but in proving any concerted action or
12 conspiracy between the private actors and the police to lay
13 out what the Plaintiff's theory is and facts with respect to
14 what that relationship was, and although it may involve, you
15 know, scandalous allegations, they are not irrelevant to the
16 case. In fact, those would be relevant on the issues that
17 would be presented in this type of lawsuit, were it ultimately
18 to go to trial. So in reviewing the complaint, I didn't see
19 any of the paragraphs that contained irrelevant information
20 with respect to the claims that are at issue in this case. So
21 the Motion to Strike is denied, and also obviously the motion
22 for attorneys fees with respect to the motion is denied. I
23 don't believe there's any basis for an award of attorneys
24 fees, even though I'm dismissing two of the Defendants. I
25 don't believe there's any basis for an award of attorneys fees

1 to the Defendants for having to make the motion in this case.
2 Okay? Are there any -- I believe that addressed the motion.
3 Is there any outstanding matters that I did not address with
4 respect to that from Defendant's counsel?

5 MR. ANESER: Not that I'm aware of, Your Honor.

6 THE COURT: Okay. So in terms of moving -- I don't
7 know, did you have your conference with the Magistrate Judge?

8 MR. ANESER: No.

9 THE COURT: Has that been scheduled or no?

10 MR. ANESER: No.

11 THE COURT: Okay. We'll issue an order
12 memorializing what I've said today, and then we're going to
13 request that the Magistrate Judge set a date for the initial
14 conference so that a discovery schedule can be set. Okay?
15 Mr. Liotti, anything from you today?

16 MR. LIOTTI: No, Sir. Thank you very much.

17 THE COURT: Okay, thank you, Counsel. Have a good
18 day.

19 MR. LIOTTI: Thank you, you too.

20 MR. ANESER: Bye-bye.

21 MR. GARRY: Bye-bye.

22 (Court adjourned)

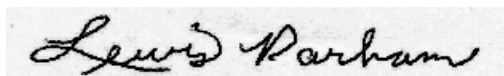
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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in cursive script, appearing to read "Lewis Parham", is written on a light gray rectangular background.

11/13/12

Signature of Transcriber

Date